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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9
10 Jeremy Pinson,
11 Plaintiff,
12 vs.
13 S. Waite, et al.,
14 Defendants.

CV-22-00375-TUC-RM

15
**DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT
ON EXHAUSTION**

16 The United States of America, by and through undersigned counsel, hereby moves
17 for summary judgment on Plaintiff's First Amended Complaint based on Plaintiff's failure
18 to exhaust administrative remedies *before* filing suit as the Prison Litigation Reform Act
19 (PLRA) requires. This motion is based on the following memorandum of points and
20 authorities, the separately filed statement of facts and all matters of record.

21 **Memorandum of Points and Authorities**

22 **I. Background**

23 **A. Plaintiff**

24 Plaintiff currently is housed at the United States Penitentiary Allenwood,
25 Pennsylvania (USP Allenwood). (Statement of Facts (SOF) 1.) Previously, she was
26 incarcerated at USP Tucson. (*Id.*) Plaintiff is serving 252 months for Mailing Threatening
27 Communications, 18 U.S.C. § 876; False Statement, *id.* § 1001(a)(2); Threat to a Juror, *id.*
28 § 876(c); and Threats Against the President, *id.* § 871(a). (SOF 2.) Plaintiff is projected to

1 release on October 5, 2026. (SOF 3.)

2 **B. Complaint**

3 Plaintiff filed a Complaint against Dr. Waite, the Federal Bureau of Prisons
4 (Bureau) and the United States alleging that she “has a history of serious and chronic
5 substance abuse including with opioid medications.” (Doc. 1 at 7.) She filed suit under
6 *Bivens*, the Federal Tort Claims Act (FTCA) and the Rehabilitation Act (RA) seeking
7 monetary damages and an “[i]njunction enjoining defendant BOP from denying plaintiff
8 Methadone or Buprenorphine while in custody.” (*Id.* at 3-6.) Upon screening, this Court
9 dismissed Dr. Waite and the Bureau and Plaintiff’s *Bivens*, FTCA and RA claims and
10 allowed her Eighth Amendment claim for injunctive relief for deliberate indifference as to
11 medical care to go forward as to the United States only. (Doc. 8 at 13.)

12 **C. First Amended Complaint (FAC)**

13 On February 23, 2023, Plaintiff filed a motion seeking leave to file the FAC. (Doc.
14 22.) On May 30, 2024, the Court granted the motion and ordered the FAC filed. (Doc.
15 50.) In the FAC, Plaintiff was seeking to bring the Bureau back as a defendant and to add
16 a non-federal defendant, Alkermes, Inc. (Doc. 51.) She alleged an Eighth Amendment
17 claim against the Bureau and an FTCA medical care claim against the United States. (*Id.*
18 at 3-4.) She also alleged multiple tort claims against Alkermes. (*Id.* at 5.) Upon
19 screening, this Court dismissed the Bureau, the FTCA claim and the claims against
20 Alkermes for failure to state a claim. (Doc. 50 at 7-9.) This Court again allowed the
21 Eighth Amendment medical care claim to go forward as to the United States for injunctive
22 relief only. (*Id.* at 7.)

23 **D. Second Motion for Leave to File Second Amended Complaint**

24 Plaintiff filed a second motion to amend her FAC, seeking to bring a three count
25 Proposed SAC, including two *Bivens* claims against Dr. Waite and three individuals who
26 were not named in her Complaint or the FAC and an FTCA action against the United
27 States. (Doc. 102.) Plaintiff also named Bureau Director Collette Peters in her official
28 capacity only for injunctive relief. (Doc. 102-2 at 5.)

1 For relief, Plaintiff sought \$100,000 in damages against each of the four *Bivens*
2 defendants, \$250,000 in damages against the United States in Count Two and four
3 injunctions. (Doc. 102-2 at 9.)

4 The Court has not yet ruled on Plaintiff's motion to amend. (Docket, generally.)

5 **E. Bureau's Administrative Remedy Program**

6 The Bureau's Administrative Remedy Program is designed to allow an inmate to
7 seek formal review of an issue relating to any aspect of her confinement. 28 C.F.R.
8 § 542.10(a). The program contains four levels of review. Initially, an inmate is required to
9 attempt to informally resolve her grievance with Unit Team staff. 28 C.F.R. § 542.13(a).
10 If the inmate is unable to resolve the grievance informally, she may submit an
11 Administrative Remedy Request to the Warden using the BP-9 Form within 20 calendar
12 days following the date on which the basis for the request occurred. 28 C.F.R.
13 §§ 542.13(a), 542.14. If the inmate is not satisfied with the Warden's response, she may
14 submit an Appeal on the BP-10 Form to the Regional Director within 20 days of the date
15 the Warden signed the response. 28 C.F.R. § 542.15. If the inmate is not satisfied with the
16 Regional Director's response, she may submit a Central Office Administrative Remedy
17 Appeal (BP-11) to the Director, National Inmate Appeals, in the Office of the General
18 Counsel within 30 days of the date the Regional Director signed the response. *Id.* The
19 appeal to the General Counsel is the final level of administrative review. *Id.* An inmate,
20 therefore, has not administratively exhausted her claim until she has filed a BP-11 with the
21 General Counsel and (1) the General Counsel has responded on the merits to the inmate's
22 BP-11 or (2) the General Counsel has failed to respond within the time allotted. 28 C.F.R.
23 § 542.18. (SOF 6.) Only after this procedure is completely exhausted is a prisoner
24 authorized to file suit in district court. 42 U.S.C. § 1997e(a). (SOF 6, 7.)

25 The Administrative Remedy Coordinator at any level may reject and return to the
26 inmate without response a Request for Administrative Remedy or appeal that does not
27 meet procedural requirements as outlined in the Code of Federal Regulations. *See* 28
28 C.F.R. § 542.17(a). (SOF 6.)

1 The Administrative Remedy Program Statement regarding the administrative
2 remedy procedures is available to USP Tucson inmates in the main law library and in the
3 Electronic Law Library in the Special Housing Unit (SHU). (SOF 10, 13.) Additionally,
4 when an inmate arrives at USP Tucson, she participates in an Admission and Orientation
5 (A&O) Program, during which she is given instructions on the Administrative Remedy
6 Program, how to obtain and submit the appropriate forms and how to exhaust claims
7 through all levels of the Administrative Remedy Program. (SOF 11.) She also is given a
8 copy of the A&O Handbook, which includes information on the Administrative Remedy
9 Program. (SOF 12.)

10 An inmate may obtain the administrative remedy or appeal forms from, and submit
11 completed forms to, any Unit Team member. (SOF 14.) The Unit Team is comprised of
12 the Unit Manager, Case Manager, Correctional Counselor and Unit Secretary. (*Id.*) While
13 the “Correctional Counselor will initial, date, and write the inmate’s last name on the top
14 right hand section of the form for accountability purposes[,]” there is no requirement that
15 an inmate provide a reason for needing an administrative remedy form to obtain that form.
16 (SOF 15.)

17 Inmates may utilize an Inmate Request to Staff Member (form BP-S148),
18 commonly called a Cop-Out, to make any written request, including that she believes that
19 her Unit Team is not providing her with administrative remedy forms or is not properly
20 processing administrative remedy forms. (SOF 16.) She can make the requests to any
21 staff member, including Associate Wardens and the Warden. (SOF 17.) An inmate may
22 file an inmate request to staff (cop-out), informal grievance (BP-8), or formal grievance
23 (BP-9, BP-10, or BP-11) while in general population or while housed in the SHU. *See* 28
24 C.F.R. § 541.31(o) (“You can submit a formal grievance challenging any aspect of your
25 confinement in the SHU through the Administrative Remedy Program[.]”). (SOF 17.)

26 **F. Plaintiff’s Administrative Remedies**

27 Between June 1, 2022, and April 4, 2024, Plaintiff filed 110 administrative
28 remedies and/or appeals. (SOF 20.) During that time, Plaintiff filed six appeals to the

1 Central Office. (SOF 22, 26.) Four were exhausted, and two were rejected. (*Id.*) One of
 2 the exhausted remedies was a request for an alternative to Vivitrol. (SOF 22.) However,
 3 that remedy was not initiated until September 11, 2023, and was not exhausted until
 4 **March 13, 2024.** (SOF 22, 24.) Meanwhile, Plaintiff had submitted the FAC on February
 5 23, 2023, and the Court had filed it on May 30, 2023.¹

6 **II. The Court should grant summary judgment because Plaintiff failed to exhaust
 her administrative remedies before filing suit.**

7 **A. Legal Standard for Motion for Summary Judgment**

8 A party is entitled to summary judgment “if the movant shows that there is no
 9 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
 10 of law.” Fed. R. Civ. P. 56(a). Material facts are those facts that may affect the outcome
 11 of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “At the summary
 12 judgment stage, facts must be viewed in the light most favorable to the nonmoving party
 13 only if there is a ‘genuine’ dispute as to those facts.” *Scott v. Harris*, 550 U.S. 372, 380
 14 (2007).

15 The party moving for summary judgment bears the initial burden of identifying
 16 those portions of the pleadings, discovery and affidavits that demonstrate the absence of a
 17 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once
 18 the movant has met its Rule 56(c) burden, the nonmovant “must do more than simply show
 19 that there is some metaphysical doubt as to the material facts Where the record taken
 20 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
 21 ‘genuine issue for trial.’” *Scott*, 550 U.S. at 380 (quoting *Matsushita Elec. Indus. Co. v.*
 22 *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

23 The nonmovant need not establish a material issue of fact conclusively in its favor.
 24 *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968). However, he must “come
 25 forward with specific facts showing that there is a *genuine issue for trial.*” *Matsushita*,
 26 475 U.S. at 587 (internal citation omitted, emphasis in original). “Conclusory, speculative
 27 testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and

28 ¹ Plaintiff dated the FAC February 17, 2023. (Doc. 51 at 6.)

1 defeat summary judgment.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th
 2 Cir. 2007).

3 Additionally, if “opposing parties tell two different stories, one of which is blatantly
 4 contradicted by the record, so that no reasonable jury could believe it, a court should not
 5 adopt that version of the facts for purposes of ruling on a motion for summary judgment.”
 6 *Scott*, 550 U.S. at 380. In deciding the motion, the Court must consider whether Plaintiff’s
 7 claims are supported by plausible *factual* statements or by conclusory allegations or
 8 directly contradicted by the record. *Soremekun*, 509 F.3d at 984; *Scott*, 550 U.S. at 380.

9 **B. Prisoners are required to exhaust administrative remedies *before* filing
 an action.**

10 The PLRA provides that no prisoner shall bring an action “with respect to prison
 11 conditions” under federal law “until such administrative remedies as are available are
 12 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is required for all suits about prison life,
 13 *Porter v. Nussle*, 534 U.S. 516, 532 (2002), regardless of the type of relief offered through
 14 the administrative process, *Booth v. Churner*, 532 U.S. 731, 741 (2001). Federal prisoners
 15 suing must first exhaust inmate grievance procedures. *Porter*, 534 U.S. at 524.
 16 Exhaustion is a prerequisite to suit, and all “available” remedies must be exhausted,
 17 “[e]ven when the prisoner seeks relief not available in grievance proceedings.” *Id.*

18 An inmate must fully exhaust all administrative remedies *before* he files the
 19 complaint, or the case must be dismissed. *McKinney v. Carey*, 311 F.3d 1198, 1199-200
 20 (9th Cir. 2002). *See also Pinson v. U.S. Dep’t of Justice*, No. Case 4:19-cv-00235-RM,
 21 Dkt 43 at 7-8 (D. Ariz. Aug. 13, 2020) (dismissing claim “without prejudice for failure to
 22 exhaust prior to filing her claim” when plaintiff did not “complete the final step in the
 23 exhaustion process until June 15, 2019, after she filed her First Amended Complaint on
 24 June 6, 2019.”).

25 Administrative exhaustion protects an administrative agency’s authority,
 26 discouraging disregard of its procedures and permitting it to correct its own errors.
 27 *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). Administrative exhaustion also promotes
 28 efficiency by permitting matters to be handled administratively, where a resolution often

1 can be reached more quickly than in the courts. *Id.* Additionally, administrative
 2 exhaustion promotes judicial economy by “reducing litigation to the extent complaints are
 3 satisfactorily resolved, and improving litigation that does occur by leading to the
 4 preparation of a useful record.” *Jones v. Bock*, 549 U.S. 199, 219 (2007).

5 The inmate must complete the administrative review process in accordance with the
 6 applicable rules. *See Woodford*, 548 U.S. at 94. Proper exhaustion requires “compliance
 7 with an agency’s deadlines and other critical procedural rules.” *Id.* at 90. Proper
 8 exhaustion under § 1997e(a) requires following “all steps that the agency holds out, and
 9 doing so *properly* (so that the agency addresses the issues on the merits).” *Id.* (cleaned
 10 up) (emphasis in original). To properly exhaust, an inmate must comply with the
 11 grievance procedures, rules and deadlines of the institution where he is incarcerated.
 12 *Jones*, 549 U.S. at 218.

13 “The level of detail necessary in a grievance to comply with the grievance
 14 procedures will vary from system to system and claim to claim, but it is the prison’s
 15 requirements, and not the PLRA, that define the boundaries of proper exhaustion.” *Jones*,
 16 549 U.S. at 218. “All ‘available’ remedies must now be exhausted; those remedies need
 17 not meet federal standards, nor must they be ‘plain, speedy, and effective.’” *Porter*, 534
 18 U.S. at 524 (*quoting Booth*, 532 U.S. at 739). Exhaustion is now mandatory, and there is
 19 no discretion to excuse it. *Id.*

20 “Exhaustion should be decided, if feasible, before reaching the merits of a
 21 prisoner’s claim.” *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014). Failure to exhaust
 22 should be raised in a motion for summary judgment: “If undisputed evidence viewed in the
 23 light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to
 24 summary judgment under Rule 56.” *Id.* at 1166.

25 The defendant has the burden to show that “there was an available administrative
 26 remedy, and that the prisoner did not exhaust that available remedy.” *Albino*, 747 F.3d at
 27 1172. Once the defendant has met this burden, the burden shifts to the plaintiff to
 28 demonstrate “that there is something in his particular case that made the existing and

1 generally available administrative remedies effectively unavailable to him.” *Id.*

2 **C. Plaintiff failed to exhaust administrative remedies before filing the FAC.**

3 On June 3, 2022, Plaintiff was given an Inmate Admission & Orientation (A&O)
 4 Handbook,² which describes the administrative remedy process. (SOF 4.) The A&O
 5 Handbook provides detailed information on how inmates may obtain administrative
 6 remedy forms, including that inmates may obtain forms from their Correctional Counselor
 7 or any Unit Team member.³ (SOF 11, 12.)

8 As detailed above, the record clearly shows that Plaintiff did not appeal properly an
 9 administrative remedy regarding the issues in the FAC to the highest level *before* filing
 10 suit. She chose instead to file suit before beginning the process. Plaintiff did not exhaust
 11 administrative remedies regarding the issues in the FAC until over a year after she
 12 submitted her FAC to the Court.

13 Under Bureau regulations, no administrative remedy is fully exhausted until the
 14 inmate has submitted a proper BP-11 to the Central Office and received a response or the
 15 time to respond has expired. (SOF 6-7.) Plaintiff did not submit her BP-11 to the Central
 16 Office regarding the issues in the FAC until January 18, 2024, almost a year after filing the
 17 FAC. (SOF 25.) In fact, Plaintiff did not even start the process until at least September
 18 11, 2023, almost seven months after she signed the FAC. (Compare Doc. 113-9 at 2 with
 19 Doc. 51 at 6).

20 Plaintiff failed to complete the administrative review process in accordance with the
 21 applicable rules. *See Jones*, 549 U.S. at 218; *Woodford*, 548 U.S. at 94. She did not
 22 properly follow the steps, “so that the agency [could] address[] the issues on the merits”
 23 before she filed suit. *See id.* (cleaned up). This Court should dismiss the FAC for
 24 Plaintiff’s failure to exhaust administrative remedies *before* filing. *See McKinney*, 311
 25 F.3d at 1199 (holding that when inmate fails to exhaust before filing the complaint,
 26 “dismissal is required under 42 U.S.C. § 1997e(a)’); *Pinson*, No. Case 4:19-cv-00235-RM,

27 ² Plaintiff acknowledged receipt of the A&O Handbook on June 3, 2022. (SOF 4.)

28 ³ The Unit Team is comprised of the Unit Manager, Case Manager, Correctional
 Counselor and Unit Secretary. (SOF 14.)

1 Dkt 43 at 7-8 (dismissing claim “without prejudice for failure to exhaust prior to filing her
2 claim” when plaintiff did not “complete the final step in the exhaustion process until June
3 15, 2019, after she filed her First Amended Complaint on June 6, 2019.”). Accordingly,
4 this Court should grant judgment for the United States on the FAC.

5 **III. Conclusion**

6 Plaintiff failed to comply with the PLRA’s requirement that she exhaust available
7 administrative remedies *before* filing the FAC. The Court should grant summary judgment
8 for the United States for Plaintiff’s failure to exhaust administrative remedies.

9 Based on the foregoing, the United States respectfully requests that this Court grant
10 summary judgment on the FAC for Plaintiff’s failure to exhaust administrative remedies.

11 RESPECTFULLY SUBMITTED: June 6, 2024.

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14 District of Arizona

15 *s/Denise Ann Faulk* _____
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18 Copy of the foregoing sent via
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27 / MSJ - Exhaustion